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THE ROLE OF ATTORNEYS-AT-LAW IN A DEMOCRATIC STATE RULED BY LAW

ABSTRACT

Attorneys-at-law, both at the individual and group level, i.e., as a professional self-government, when performing their duties and obligations arising from the provisions of law and deontological norms defining their professional status, have a role of a systemic nature to play. This role is intended to contribute to the strengthening and development of the democratic character of the Republic of Poland. A particularly important tool for carrying out this task of the National Bar of Attorneys-at-Law is the possibility to present opinions on draft legal acts, a constitutional tool which, due to the very essence of the attorney-at-law's profession, allows the National Bar of Attorneys-at-Law to present at the stage of legislative work possible threats arising from the proposed normative acts to constitutionally guaranteed civil rights and freedoms.

The systemic role of attorneys-at-law in a democratic state ruled by law can also be seen in an individual dimension, which is manifested primarily in the course of providing legal assistance (as part of the professional practice). After all, the rule of law clause cannot be deprived of its fundamental component, which is considered to be the rights and freedoms of the individual. In this concept of the rule of law, attorneys-at-law, who participate in the implementation of the rule of law by providing legal assistance, can and should be treated as its constituent.

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The systemic role to be played by attorneys-at-law individually and *in gremio*, i.e., as a professional self-government, becomes particularly important in times of crisis of the state ruled by law. The National Bar of Attorneys-at-Law, like the bar associations of other legal professions, is particularly predestined to take the floor in public debate on changes in the administration of justice that may violate the constitutional order.

Keywords: attorney-at-law, democratic state ruled by law, National Bar of Attorneys-at-Law

The rule of law never dies by itself. The henchmen of its death are always lawyers.

Supreme Court Judge, professor Włodzimierz Wróbel

Introduction

Jurisprudential considerations about the role which attorneys-at-law have to play in a democratic state ruled by law are possible only if two obvious boundary conditions are met. These include the applicable legal regulations governing the profession of attorney-at-law in a state in which the principle of a state ruled by law is a systemic rule. Thus, it should be stressed that the mere existence of legal regulations pertaining to the practice of a particular profession does not constitute a sufficient premise for considering whether persons practicing that profession have tasks to perform that would justify linking them to the principle of a democratic state ruled by law. Of key importance in this respect, therefore, is the content of regulations that shape a particular profession, and which must remain in a functional, servile relationship with the principle of a democratic state of law.[2]

Before proceeding any further, it is worth noting that since the principle of a democratic state ruled by law is a systemic rule, and at the same time we assume that persons practicing a given profession have a role to play that is directly or indirectly determined by the constitution, it is reasonable to conclude that these persons to a greater or lesser extent perform a constitutional function, thus, attorneys-at-law, at both the individual and group level, i.e., as a professional self-government, when performing their duties and obligations arising from the provisions of law and deontological norms defining their professional status, have a role of a systemic nature to play.

Prior to proceeding to detailed comments on the issue indicated in the title of this article, one should start by referring to Article 2 of the Constitution of the Republic of Poland of 2 April 1997,[3] according to which the Republic of Poland is a democratic state ruled by law, implementing the principles of social justice. It is worth noting that the principle of a democratic state ruled by law was introduced to the Polish constitutional order by the so-called

2 There is no doubt that many regulated professions, i.e., those where access to which and practicing of which are determined by generally applicable regulations, are systemically or constitutionally indifferent.

3 Journal of Laws No. 78, item 483.

December amendment[4] at the initial stage of changes in the Polish political system after the fall of communism. This was a confirmation of the adoption by the Polish legislator of the "European standard of a democratic and legal state", which at the same time (by emphasizing democratism and legitimacy as well as integrity as the qualities of a state) opened the way to a debate on the adopted model of the state.[5] Provisions of the Constitution currently in force in Poland, therefore, confirm that in fundamental systemic questions, the principle of a democratic state ruled by law is treated as a natural element of the system.

Without addressing the issue of understanding the state ruled by law, due to the size of the article, it should be noted, however, that it is assumed that the most important clause for the normative shape of the rule of law is the idea of limiting the arbitrary power of the state over the person and determination of the relationship between the person and the state.[6] The rule of law clause, however, includes not only human rights and freedoms but also principles defining the way in which public authorities act.[7] These two dimensions of the rule of law clause determine the further course of the dilatation.

The systemic role of attorneys-at-law

The profession of an attorney-at-law is one of the public trust professions set out in Article 17.1 of the Polish Constitution. The constitutional law doctrine indicates that a feature[8] of the public trust profession is that it is practiced not for profit but in order to serve the public interest.[9] It seems, however, that the more accurate view is that

4 Act of 29 December 1989 on amending the Constitution of the Polish People's Republic, Journal of Laws of 1989, No. 75, item 444.

5 I. Lipowicz, *Pojęcie państwa w projektach Konstytucji RP*, „Civitas. Studia z Filozofii i Polityki" 1997, no. 1, p. 149. It is worth noting that Polish political traditions refer to the idea of the rule of law in the time of the First Republic, see for instance: J. Malec, *O rządach prawa w dawnej Polsce*, [in:] *Państwo demokratyczne, prawne i socjalne. Tom 1. Księga jubileuszowa dedykowana profesorowi Zbigniewowi Antoniemu Maciągowi*, ed. M. Grzybowski, P. Tuleja, Kraków 2014, p. 91 et seq. Henrician Articles of 1573 were of particular importance in the context of respect for the law, and the rule of law was one of the systemic principles in the Constitution of 3 May 1791. See also: A. Dziadzio, *Polski model „rządów prawa", a europejska wizja „państwa prawa" z XIX w.*, [in:] *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, v. 1, ed. P. Kardas, T. Sroka, W. Wróbel, Warsaw 2012, p. 137 et seq. It is emphasized in the literature that the German concept of a legal state, as presented by K. Stern, was of particular importance for the contemporary Polish legislature. See: E. Morawski, *Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego*, Toruń 2003.

6 P. Tuleja, *Komentarz do art. 2*, [in:] *Konstytucja RP. Tom I. Komentarz art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016, p. 222.

7 *Ibidem*.

8 Attempts made in the literature to reconstruct the features of a public profession based on existing public law corporations indicate that such features include: 1) provision of services in a situation of threat to goods treated as generally public goods, 2) pursuing important values and social needs, 3) receiving information about personal and even intimate life, 4) obligation to keep secrecy, 5) adhering to ethical principles, see: E. Tkaczyk, *Samorząd zawodowy w świetle Konstytucji Rzeczypospolitej Polskiej*, "Przegląd Sejmowy" 2011, No. 6, p. 67.

9 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2009, p. 117.

the public trust professions are distinguished, inter alia, by their *quasi*-missionary nature,[10] i.e., not so much by the elimination of the profit motive as by distancing from the profit criterion, resulting from the fact that these professions are practiced in order to serve the public interest.[11]

The systemic role of the professional self-governments referred to in Article 17.1 of the Constitution is determined by the structure of the Basic Law. The placement of Article 17 in the first chapter of the Constitution of the Republic of Poland entitled "The Republic" is an important interpretation indicator. The usefulness of the interpretative argument *a rubrica* has been repeatedly emphasized by the Constitutional Tribunal, the Supreme Court, or the Supreme Administrative Court. There is no doubt that due to the importance of the Constitution in the legal system, systemic interpretation takes on particular significance in the course of interpreting its provisions. Thus, it should be assumed that professional self-governments, including the National Bar of Attorneys-at-Law, are one of the institutional elements of the system of the Republic of Poland.

The doctrine rightly notes that the functioning of public trust professions contributes to the strengthening and development of the democratic character of the Republic of Poland.[12] In this context, public trust professions act for the benefit of all citizens of the Republic of Poland and contribute to the observance by the Polish authorities of the principle of legalism set forth in Article 7 of the Constitution.[13] The obvious conditions for the accuracy of this view are the fulfillment of two conditions manifested in the systemic practice. The first is appropriate, i.e., consistent with the prescribed by law model, fulfillment of tasks imposed on professional self-governments by the applicable legal regulations. In the case of professional self-governments, there is often a risk of putting the corporate interest ahead of the public one. The professional self-government may be said to have failed to fulfill its function if its activities focus on the protection of particular interests of its members, with protection of the public interest being either marginalized or completely ignored.

Another aspect of this issue is the treatment of professional self-governments by public authorities, i.e., the systemic approach of state bodies to professional self-governments. Effective performance of tasks by professional self-governments is not possible without the goodwill of relevant public authorities, manifested in the a priori treatment of professional self-governments as institutions that participate, even if their powers are of a "soft" nature, in various mechanisms of the functioning of the modern state.[14]

10 It is worth noting that attorneys-at-law and advocates all too often act as *pro bono* trial counsels.

11 W.J. Wołpiuk, *Zawód zaufania publicznego z perspektywy prawa konstytucyjnego*, [in:] *Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisji Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem marszałka Senatu RP Longina Pastusiaka, 8 kwietnia 2002 r.*, ed. S. Legat, M Lipińska, Senate of the Republic of Poland, Publishing House of the Senate Chancellery, Warsaw 2002, p. 22.

12 A. Trubalski, *Samorządy zawodów zaufania publicznego na przykładzie samorządu radców prawnych. Perspektywa konstytucyjnoprawna;* "Studia Iuridica Lublinensia" 2014, No. 21, p. 225.

13 *Ibidem*.

14 In particular, it is about how to treat opinions submitted by relevant professional self-governments in the lawmaking process.

Attorneys-at-law are organized in accordance with the principles of a professional self-government (Article 5 of the Act on Attorneys-at-Law[15]), which is a professional self-government within the meaning of Article 17.1 of the Polish Constitution. Therefore, the constitutional functions of the National Bar of Attorneys-at-Law include representing them and exercising supervision over the proper practice of the profession. The case law of the Constitutional Tribunal indicates that by creating a professional self-government, the state entrusts a certain professional group with the performance of specific public tasks and equips it with the appropriate powers. Due to the specific nature of the entrusted public tasks, the Constitutional Court perceives professional self-government as a tool for realizing the principle of a democratic state ruled by law.[16]

Based on this assessment by the Constitutional Tribunal, it is worth considering which activities of the National Bar of Attorneys-at-Law taken in the performance of its tasks should be particularly linked with the systemic role of the professional self-government. It is not possible to assume, though, that each activity of the National Bar of Attorneys-at-Law related to its statutory tasks is connected with the fulfillment of its constitutional function. In my opinion,[17] the tasks set forth in Article 60 point 2 of the AAL, i.e., giving opinions on draft legal acts and presenting conclusions regarding legal norms, should be considered particularly important. It is a constitutional tool that, due to the very essence of the attorney-at-law's profession, allows the National Bar of Attorneys-at-Law to present, at the stage of legislative work, possible threats arising from the proposed normative acts to constitutionally guaranteed civil rights and freedoms. These threats can manifest themselves both in procedural rules, violating, for example, the right to a defense at trial, but also in constitutional rules governing the justice system.[18] These opinions (expert analyses) should be seen as one of the tools with which attorneys-at-law, as members of a professional self-government, can and should influence the shape of the adopted law. Many opinions submitted by the National Bar Council of Attorneys-at-Law (NBCAL) in the course of legislative works contain constitutional objections with regard to draft legal acts. For example, one can point out opinions drawn up in connection with the reform of the judiciary, but also with draft legal acts which, by amending procedural regulations, violated the right of an individual to a fair trial.[19]

15 Act of 6 July 1982 on attorneys-at-law, consolidated text published in Journal of Laws of 2020, item 75, as amended, hereinafter referred to as the AAL.

16 Judgment of the Constitutional Tribunal of 7 March 2012, K 3/10, OTK-A 2012/3/25.

17 Due to limitations resulting from the size of the article, issues relating to the supervision over the practice of the profession remain outside the scope of consideration.

18 The organizational unit that has been established in order to carry out this (inter alia) task is the Centre for Studies and Legislation, acting on the basis of § 57 of the Rules of Procedure of the National Bar of Attorneys-at-Law and its Bodies, see Resolution No. 562/X/2019 of the Presidium of the National Bar Council of Attorneys-at-Law of 10 October 2019 announcing consolidated text of the Rules of Procedure of the National Bar of Attorneys-at-Law and its Bodies. The task of submitting to the National Bar Council of Attorneys-at-Law proposals of opinions on draft legal acts evaluated by the National Council in accordance with the provisions of Article 60 point 2 of the AAL was entrusted to the Head of the Centre.

19 See opinion on the website: https://obsil.kirp.pl/opinie-i-stanowiska/.

The systemic role of attorneys-at-law in a democratic state ruled by law can also be seen in an individual dimension, which is manifested primarily in the course of providing legal assistance (as part of the professional practice). After all, the rule of law clause cannot be deprived of its fundamental component, which is considered to be the rights and freedoms of the individual. In this concept of the rule of law, attorneys-at-law, who participate in the implementation of the rule of law by providing legal assistance, can and should be treated as its constituent. Attorneys-at-law, in addition to the state law enforcement bodies, uphold civil liberties and rights. As a professional group, they are professionally prepared to protect the subjective rights of citizens by providing them with legal assistance in the course of preparations for court litigation and all available alternative dispute resolution methods.[20] If one accepts the view that the idea of restricting the arbitrary power of the state over the person and determination of the relationship between the person and the state is an element of the state ruled by law, then the role of an attorney-at-law as the "guardian" of civil liberties and rights is particularly evident in those cases in which the state is a party to the dispute.

The possibility for attorneys-at-law to practice their profession under an employment or service relationship justifies the special role to be played by attorneys-at-law employed in the public administration. One of the forms of legal assistance within the meaning of Article 6.1 of the AAL is drawing up legal opinions. Advisory legal opinions *sensu largo*, among which one can distinguish general (abstract) and problematic (specific) legal opinions,[21] influence, or at least should influence,[22] the mode of operation of the entity for which the opinion is prepared. Leaving detailed issues related to the legal status of public administration employers aside, and while making certain generalizations, it should be concluded that a significant part of these opinions is developed for the needs of public administration bodies. In the case of advisory opinions *sensu largo*, attorneys-at-law, by interpreting applicable regulations, essentially influence the practice of law application by public administration bodies, and thereby significantly affect the implementation of the principle of legalism expressed in Article 7 of the Constitution of the Republic of Poland, which is an element of the rule of law.

The systemic role to be played by attorneys-at-law individually and *in gremio*, i.e., as a professional self-government, becomes particularly important in times of crisis of a state ruled by law.[23] The National Bar of Attorneys-at-Law, like bar associations of other legal professions, is particularly predestined to take the floor in the public debate on changes in the administration of justice that may violate the constitutional order. It is worth noting in this context the positions of the National Bar Council of Attorneys-at-Law of 8 April 2017, obligating the President, Vice President, and the Presidium of the National Bar Council of Attorneys-at-Law to actively participate in the public

20 R. Stankiewicz, *O istocie zawodu radcy prawnego*, Acta Universitatis Wratislaviensis, No. 3996, „Przegląd Prawa i Administracji" CXXIII, Wrocław 2020, p. 264.

21 M. Król, L. Leszczyński, [in:] *Opinie prawne w praktyce*, ed. M. Król, Warsaw 2020, p. 23.

22 Of course, legal opinions are not binding, yet disregarding them would make decisions to prepare them unreasonable, *ergo* ignoring them is a flaw from the praxeological point of view.

23 J. Papp, *Prof. Andrzej Zoll: Polska już nie jest państwem prawa*, https://www.prawo.pl/prawnicy-sady/polska-juz-nie-jest-panstwem-prawa-opinia-prof-andrzeja-zolla,502132.html.

debate.[24] The National Bar Council of Attorneys-at-Law obligated the President, Vice President, and the Presidium of the NBCAL to present in this debate the NBCAL position according to which actions taken by the executive and legislative authorities towards the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, and the common courts of law raise concerns as violating the principles binding in a democratic state ruled by law. In a similar vein, on 3 October 2020, the NBCAL adopted a position on infringements of judicial independence, stressing that it is indispensable for maintaining citizens' confidence in the judiciary and calling on public authorities to cease any activities undermining judicial independence.[25]

A crisis of the rule of law from the perspective of an individual attorney-at-law implies the need to take an appropriate attitude towards challenges posed at the time of threats to the constitutional order. One of the "dilemmas" that an attorney-at-law may face is taking part in a competition procedure conducted by the National Council of the Judiciary acting on the basis of the Act of 12 May 2011 on the National Council of the Judiciary.[26] The model of access to the profession of a judge in Poland makes it possible for attorneys-at-law who have long enough professional experience and meet other conditions set forth in the Act of 27 July 2001 – Law on the common court system,[27] to take part in competitions for vacant judge positions. However, a potential decision to participate in such a procedure, in the light of judgments of the Court of Justice of the European Union[28] and the European Court of Human Rights,[29] must be assessed negatively, though it is worth noting that participation in a competition for the vacant judge post organized by the NCJ could not have been earlier assessed differently.[30]

Summary

The systemic role of attorneys-at-law in Poland is reflected in the provisions of the Constitution of the Republic of Poland and the Act on Attorneys-at-Law. These regulations

24 *Stanowisko KRRP w sprawie udziału samorządu radców prawnych w debacie publicznej o aktualnej sytuacji wymiaru sprawiedliwości*, https://kirp.pl/stanowisko-krrp-sprawie-udzialu-samorzadu-radcow-prawnych-debacie-publicznej-o-aktualnej-sytuacji-wymiaru-sprawiedliwosci/.

25 *Stanowisko KRRP z dnia 3 października 2020 r. w sprawie naruszania niezawisłości sędziowskiej i niezależności sądów*, https://kirp.pl/stanowisko-krrp-z-dnia-3-pazdziernika-2020-r-w-sprawie-naruszania-niezawislosci-sedziowskiej-i-niezaleznosci-sadow/.

26 Consolidated text published in Journal of Laws of 2021, item 269.

27 Consolidated text published in Journal of Laws of 2020, item 2072, as amended.

28 In particular CJEU judgment of 6.10.2021 (case C-487/19 W.Ż.). More on the significance of the judgment for the status of judges appointed under the procedure involving the NCJ, see A. Grzelak, *Orzeczenia sędziów powołanych przy udziale nowej KRS – konsekwencje prawne wyroku Trybunału Sprawiedliwości UE z 6.10.2021 r. (sprawa C-487/19 W.Ż.),* LEX/el. 2022.

29 Judgment of the ECtHR in *Reczkowicz v. Poland* (Application no. 43447/19).

30 Cf. arguments presented in the grounds for the resolution of 23 January 2020 adopted by a panel of the combined Civil, Criminal, and Labour and Social Insurance Chambers of the Supreme Court (BSA I-4110–1/20) and in the justification of the decision of the Supreme Court of 16 September 2021 (I KZ 29/21).

establish a coherent mechanism that ideally should guarantee both individual attorneys-at-law and their professional self-government a real influence on the degree to which the constitutional principle of a democratic state ruled by law is implemented. When acting as a trial counsel, drawing up opinions for the purpose of law application by public administration bodies, or providing expert opinions in the legislative process, attorneys-at-law should bear in mind that they practice a public trust profession to which the legislator has given a special meaning going far beyond the ordinary business of making a living. Whether attorneys-at-law will contribute to the building and strengthening of a democratic state ruled by law, or whether they will become the henchmen of its death, will be determined by how faithful they will remain to the oath set forth in Article 27.1 of the AAL. Under normal circumstances, in order for attorneys-at-law to fulfill their constitutional role, it is sufficient that they carry out their professional duties with due diligence, protecting the interests of the parties referred to in Article 2 of the AAL. At the time of a constitutional crisis affecting the administration of justice, the proper exercise of their constitutional role means refraining from participation in competitions organized by the National Council of the Judiciary for vacant judge positions.

Bibliography

Literature

Banaszak B., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2009.

Dziadzio A., *Polski model „rządów prawa", a europejska wizja „państwa prawa" z XIX w.*, [in:] *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, v. 1, ed. P. Kardas, T. Sroka, W. Wróbel, Warsaw 2012.

Grzelak A., *Orzeczenia sędziów powołanych przy udziale nowej KRS – konsekwencje prawne wyroku Trybunału Sprawiedliwości UE z 6.10.2021 r. (sprawa C-487/19 W.Ż.),* LEX/el.

Lipowicz I., *Pojęcie państwa w projektach Konstytucji RP*, Civitas. Studia z Filozofii i Polityki, 1997, no. 1.

Morawski E., *Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego*, Toruń 2003.

Opinie prawne w praktyce, ed. M. Król, Warsaw 2020.

Państwo demokratyczne, prawne i socjalne. Tom 1. Księga jubileuszowa dedykowana profesorowi Zbigniewowi Antoniemu Maciągowi, ed. M. Grzybowski, P. Tuleja, Kraków 2014.

Stankiewicz R., *O istocie zawodu radcy prawnego*, Acta Universitatis Wratislaviensis, no. 3996, "Przegląd Prawa i Administracji" CXXIII, Wrocław 2020.

Tkaczyk E., *Samorząd zawodowy w świetle Konstytucji Rzeczypospolitej Polskiej*, "Przegląd Sejmowy" 2011, No. 6.

Trubalski A., *Samorządy zawodów zaufania publicznego na przykładzie samorządu radców prawnych. Perspektywa konstytucyjnoprawna*, "Studia Iuridica Lublinensia" 2014, No. 21.

Tuleja P., *Komentarz do art. 2*, [in:] *Konstytucja RP. Tom I. Komentarz art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016.

Wołpiuk W.J., *Zawód zaufania publicznego z perspektywy prawa konstytucyjnego*, [in:] *Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisji Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem marszałka Senatu RP Longina Pastusiaka, 8 kwietnia 2002 r.*, ed. S. Legat, Małgorzata Lipińska]; Senate of the Republic of Poland, Warsaw: Publishing House of the Senate Chancellery, 2002.

Legal acts

Act of 12 May 2011 on the National Council of the Judiciary, consolidated text published in Journal of Laws of 2021, item 269.

Act of 29 December 1989 on amending the Constitution of the Polish People's Republic, Journal of Laws of 1989, No. 75, item 444.

Act of 6 July 1982 on attorneys-at-law, consolidated text published in Journal of Laws of 2020, item 75, as amended.

Constitution of the Republic of Poland of 2 April 1997 Journal of Laws No. 78, item 483.

Judgments

CJEU judgment of 6 October 2021 (case C-487/19).

Judgment of the Constitutional Tribunal of 7 March 2012, K 3/10, OTK-A 2012/3/25.

Judgment of the ECtHR in Reczkowicz v. Poland (Application no. 43447/19).

Orders of the Supreme Court of 16 September 2021. (I KZ 29/21).

Resolution of a panel of the combined Civil, Criminal, and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020 (BSA I-4110–1/20).